Betfair Pty Ltd v Western Australia and the new jurisprudence of section 92

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Except for an immediate small flurry of cases, s 92 of the Australian Constitution went to sleep for 20 years after the High Court's ground-breaking decision in Cole v Whitfield (1988) 165 CLR 360. Then in 2008, this pivotal guarantee of free trade among the States in our 19th-century foundational document came into collision with new, 21st-century, electronic ways of doing business, to which State geographical boundaries were largely irrelevant – except that it was the States that sought to regulate this business. In Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, involving State regulation of internet gambling, the High Court reminded us of the gospel according to Cole v Whitfield: the States cannot regulate in a way that discriminates against interstate trade so as to confer protectionist benefits on their own intrastate trade. In the age, however, of the new economy, and of national competition law, some commentators have asked whether the national "common market" is adequately fostered by confining s 92 to the prevention of State protectionism. Two further internet gambling cases in 2012 appear to squash any suggestion in the 2008 case that the High Court might stray from the true path of Cole v Whitfield and expand the ambit of s 92 beyond State protectionism – although a possible issue raised by laws that lessen competition without involving State protectionism was left to another day. In the author's view, s 92 is appropriately confined to the prevention of State protectionism, with broader protection of the common market best left to other mechanisms.

INTRODUCTION

In the impossibly busy life of a modern law school Dean, one must segment one's life, deal with one issue (or crisis) at a time, and not succumb to paralysis by thinking too much about the tasks we can put on hold by storing them in that welcome refuge called "the future". I have to admit that I tried my best to store away the task of writing this conference paper. But the best laid plans can go awry. Every time I sat down over the summer in front of the television to watch the cricket, the word "Betfair" would flash up on the screen, as if it were a subliminal message from Gilbert + Tobin Centre Director, Andrew Lynch, to get on with it. Every time I drove to work, my regular route would take me past a building site, where a hoarding prominently displayed a sign that said "Looking after YOU, at Section 92"![1] It rather reminded me of the time, many years ago, that I needed a break from writing my book *Encounters with the Australian Constitution*,[2] and took my children to Sydney's Taronga Park Zoo – only to be confronted just inside the gate by a pile of building materials labelled in large letters "Rocla Concrete Pipes".[3]

I guess we all see the world through our particular lens, and for many years, thinking about constitutional law, and especially about s 92, did dominate my world view. I can neither confirm nor deny that, years ago, and long before *Cole v Whitfield* (1988) 165 CLR 360, I used to wear a s 92

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[1] See the photographic evidence included at the end of this article (App 1).

[2] Coper M, *Encounters with the Australian Constitution* (de luxe ed 1987; pop ed 1988, CCH Ltd 1987).

[3] See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

T-shirt – a T-shirt that said, on the front, "section 92", and, on the back, "absolutely free". Neither can I confirm or deny that, in some kind of enigmatic silent statement, I used to wear this T-shirt under my more conventional attire when, in the 1970s, I sat in on the argument in s 92 cases during the Sydney sittings in the High Court's old Darlinghurst courtroom. Denial, however, has been more difficult since I was outed in a book review by Sir Anthony Mason of my 1983 book on s 92.[4]

The T-shirt, if it ever existed, is now in tatters, rather like, and I suppose emblematic of, the old law on s 92, as it was, or so far as it could be ascertained,[5] before *Cole v Whitfield*. Yet reading the decision in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418[6] has made me wonder whether any of the remnants of the T-shirt are worth preserving and recycling into some new garment, and that is one of the aspects of *Betfair* that I want to explore with you. I take the reference to the "new jurisprudence of section 92" in the title I was given for this talk to refer to the law since *Cole v Whitfield*, not to any revolution effected by *Betfair*, so one question for us is whether *Betfair* affirms and embeds that law, or alternatively foreshadows some further development or even change of direction. The latter, by the way, would be the more consistent with s 92's turbulent and colourful past.

SECTION 92'S COLOURFUL PAST

Before I focus on *Betfair*, may I just say a very brief word about that colourful past?

As you all know, s 92 provides that "trade, commerce and intercourse among the states … shall be absolutely free". The challenging task of converting what was acknowledged on all sides to be a useful political slogan – a slogan that was pivotal to securing the federation of the colonies – into a set of workable legal principles, has been so wonderfully productive of anguished cries of exasperation that I was seriously tempted to fill my 20 minutes today entirely with a reading of my favourite anthology of the poetry of s 92. However, you can find that anthology scattered throughout my book on s 92,[7] and reproduced as well in a second book on s 92 (can you believe it, two whole books on one section of the *Constitution*?), the very recent book of Dr Gonzalo Villalta Puig,[8] to which I refer a little later. So just let me indulge myself, and perhaps amuse you, with just one quote, which even those of you who are familiar with it will not have heard for some time.

This is Sir George Rich, a colourful character who, after 37 years on the Bench, retired in 1950 at the age of 87 to get married and start a new life.[9] He did not write a great deal in his 37 years on the High Court, and we know now – somewhat shockingly – that much of what he purported to write was in fact penned for him by Sir Owen Dixon,[10] but when he did write, he managed to do it with style and flair. This is what he said about s 92 in *James v Cowan* (1930) 43 CLR 386 at 422-423:

> The rhetorical affirmation of sec 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words "absolutely free," the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a

[4] Mason, "Book Review" (1983) 6 UNSWLJ 234, reviewing Coper M, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983).

[5] See especially *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 616 (Deane J).

[6] Two subsequent cases, *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 and *Sportsbet Pty Ltd v New South Wales* (2012) 86 ALJR 446, are noted in the postscript.

[7] Coper, n 4. Each chapter is preceded by a selection of luscious (though mostly anguished) quotes, totalling around 50 in all.

[8] Villalta Puig G, *The High Court of Australia and Section 92 of the Australian Constitution: A Critique of the Cole v Whitfield Test* (Lawbook Co, 2008).

[9] Sheller S, "Rich, George Edward" in Blackshield T, Coper M and Williams G (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) (*Oxford Companion to the High Court*) p 605.

[10] Ayres P, "Dixon Diaries" in *Oxford Companion to the High Court*, n 9, p 222. Dixon also wrote for McTiernan J: see Kirby M, "McTiernan, Edward Aloysius" in *Oxford Companion to the High Court*, n 9, p 466; Coper M, "We Are What We Write", ANU College of Law Postgraduate Research Conference, Canberra, June 2006; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645603; http://www.austlii.edu.au/au/journals/ALRS/2006/3.html.

> commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed. As soon as the section was brought down from the lofty clouds whence constitutional precepts are fulminated and came to be applied to the everyday practice of trade and commerce and the sordid intercourse of human affairs, the necessity of knowing and so determining precisely what impediments and hindrances were no longer to obstruct inter-State trade obliged this Court to attempt the impossible task of supplying an exclusive and inclusive definition of a conception to be discovered only in the silences of the *Constitution*.

Cole v Whitfield and the new law on s 92

Well, it took nearly another 60 years of twists and turns, blind alleys, inconsistencies, and cacophonous voices before a unanimous High Court in *Cole v Whitfield* decisively rejected the view that s 92 guaranteed any kind of individual right to trade interstate and adopted the view that the section prohibited measures that discriminated against interstate trade in a protectionist sense.[11] The section did not entrench laissez-faire capitalism, and did not therefore have the dramatic consequence of preventing the nationalisation of our major industries like the banks[12] and the airlines,[13] but was rather directed to securing a common market throughout Australia for the exchange of goods and services. Henceforth, s 92 would be infringed only by laws that were discriminatory in a protectionist sense, and even they might pass muster if they were directed to a non-protectionist object and were appropriate and adapted, or in the vernacular as it has evolved, proportionate, to the achievement of that object.[14]

Let me refresh your memory with two quick examples. In *Cole v Whitfield* itself, a Tasmanian law that prohibited the possession in Tasmania of undersized crayfish was held to apply equally to Tasmanian and South Australian crayfish without conferring any local advantage, and was held further, in any event, to be justified by the practical needs of law enforcement given the difficulty of distinguishing between the two classes of crayfish. On the other hand, two years later in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, a South Australian law that required a higher deposit on non-refillable bottles than on refillable bottles was held to operate in fact to give an advantage to the local brewers, and to be incapable of being justified as a proportionate environmental protection measure.

Almost contemporaneously with *Cole v Whitfield*, in *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, a Victorian tax (licence fee) on tobacco retailers who bought their tobacco from out-of-State wholesalers (there being no tax on retailers who bought from local wholesalers) was held to be invalid. I have always preferred the minority view in that case[15] that, taking the scheme as a whole, and with regard in particular to the presence of an equivalent tax on local wholesalers, there was no discrimination in a protectionist sense, but there seems to be a consensus that the decision turned on how the legislative scheme was viewed and does not erode the integrity of the governing principles laid down in *Cole v Whitfield*.[16] I am happy to go along with that. The decision in *Bath v Alston Holdings* was an early indication of a proposition that should surprise no one, namely, that any test for invalidity under s 92, like any other contested and contentious part of the *Constitution*, will throw up some difficulties in application, requiring judgment and yielding differences of opinion.

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[11] See generally Coper M, "Section 92 of the Australian Constitution since Cole v Whitfield" in Lee HP and Winterton G (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) p 129.

[12] *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

[13] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

[14] *Cole v Whitfield* (1988) 165 CLR 360 at 408. For an account of the planning and unfolding of the litigation, in which I had the honour to appear as counsel, see Coper M, "Cole v Whitfield" in *Oxford Companion to the High Court*, n 9, p 108.

[15] Coper, n 11, p 134; see also Zines L, *The High Court and the Constitution* (5th ed, Federation Press, 2008) p 186.

[16] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 468.

BETFAIR PTY LTD V WESTERN AUSTRALIA

After this small flurry of s 92 cases from 1988 to 1990,[17] there was very little litigation for almost another 20 years, until *Betfair* in 2008[18] – a consequence, no doubt, of the narrowing of the area of operation of s 92, and also possibly an indication that the new law was providing better guidance than the old. *Betfair*, a unanimous decision like *Cole v Whitfield* and *Castlemaine Tooheys*, sits comfortably with the new law on s 92 and the line of cases, sparse as it is, that exemplify it. My colleague, Amelia Simpson, has written an excellent comment on the case in Volume 19 of the *Public Law Review*,[19] which I commend to you and which relieves me of the need to set out the decision in any detail.

In brief, Western Australia prohibited betting on the outcome of sporting events by means of a betting exchange,[20] that is, an arrangement whereby punters may back a competitor to win or lose, and are matched against each other, the exchange (unlike bookmakers) bearing no risk but taking a small commission. Tasmania, on the other hand, permitted betting via a betting exchange, at least under licence.[21] Betfair obtained a licence and set up business in Tasmania, from where it operated nationally by telephone and by the internet, via its Hobart-based call centre and computer server.

Betfair and one of its customers, a punter who accessed the betting exchange via the internet from his home in Western Australia, brought an action in the original jurisdiction of the High Court challenging the validity of the Western Australian prohibition of betting via a betting exchange, with Betfair also challenging a provision of the Western Australian Act that made it an offence to publish a Western Australian horse or greyhound race field without the approval of the Minister[22] (Betfair having applied for and been denied that approval).

In a joint judgment of Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ, and a separate judgment of Heydon J, the High Court held that the impugned provisions of the Western Australian law infringed s 92 and could not therefore apply either to Betfair, the betting exchange operator, or to its customer punter. Finding that the relevant market comprised the substitutable betting operations of bookmakers, totaliser agency boards (TABs), and betting exchanges, the differences going to betting methods and arrangements, the court held that the laws in question operated to give a competitive advantage to Western Australian operators at the expense of out-of-State operators. So far as that advantage was argued to be necessary in order to protect the revenues flowing to the government and the racing industry in Western Australia, that only underlined the point; so far as it was argued to be necessary to preserve the integrity of the racing industry from the threat of punters being able to back horses to lose, the legislation was far broader than was necessary to achieve that purpose.[23]

THE IMPLICATIONS OF BETFAIR

Summarised in this way, *Betfair* sits comfortably, as I said, with the new law on s 92, as articulated and applied in *Cole v Whitfield*. Yet it seems to have made some observers quite jumpy about what it might portend and about whether it seeks to undermine *Cole v Whitfield* and smuggle back in some of the pre-existing law. I think that this concern is misplaced, or at least overstated, and I devote the rest of this paper to explaining why.

[17] Including *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.

[18] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

[19] Simpson A, "Comment: Betfair Pty Ltd v Western Australia" (2008) 19 PLR 191. See also Ball E, "Section 92 and the Regulation of E-Commerce: A Case Note on Betfair Pty Ltd v Western Australia" (2008) 36 Fed L Rev 265; Oreb N, "Betting Across Borders – Betfair Pty Ltd v Western Australia" (2009) 31 Syd LR 607; Gray A, "State-Based Business Licensing in Australia: The Constitution, Economics and International Perspectives" (2009) 14 Deakin LR 165 at 170-173; Makeham H, "Comparing Apples with Oranges? Drawing Lessons from the Australian Constitutional Experience with the Anti-Monopoly Law of the People's Republic of China" (2010) 40 HKLJ 129 at 150-156.

[20] *Betting Control Act 1954* (WA), s 24(1AA).

[21] *Gaming Control Act 1993* (Tas), s 76I.

[22] *Betting Control Act 1954* (WA), s 27D(1).

[23] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 478-482.

The first point to make is that the commentators may be excused for their hesitant reactions to the portent of *Betfair*. We are used to the High Court speaking like the oracle at Delphi, and on appropriate occasions we may both admire the wisdom and depth of its Delphic utterances and acknowledge the instrumentalism of this tool of future flexibility. But to my mind, and I hope you do not mind me not mincing my words here, *Betfair* simply displays a rather poor standard of the judicial craft of judgment writing.

I am referring here to the joint judgment – Heydon J is true to his oft-stated ethos of deciding cases on narrow grounds, without unnecessary frills or side trips (an approach that is itself open to debate).[24] The joint judgment is, to my mind, a judgment of scattered observations, jumbled organisation, and ungainly expression. It may undermine the argument of those who see joint or collective judgments of the High Court as the true path to clarity and certainty in the law.[25] Geoffrey Sawer once said that the joint judgment in the *Engineers' Case* in 1920[26] was one of the worst written and organised opinions in Australian judicial history.[27] Leslie Zines has expressed a similar view about *Betfair*.[28] I know at conferences like this we are expected to focus primarily on the substantive law, but the question of judicial craft has a direct impact on the extent to which that law can be stated with clarity. I acknowledge also that we have come a long way since the days of the unconstrained flow of a single Dixonian paragraph over pages and pages of the *Commonwealth Law Reports* – but we still have a way to go.

Having said that, some of the observations of the joint judgment in *Betfair* are interesting and worthy of note. The subject of gambling and other transactions conducted via the internet inevitably raised the question of the artificiality of State boundaries in the "new economy", and this, in combination with the increased mobility of people, challenged the traditional idea of the raison d'être of the States as being to safeguard the welfare of the "citizens" or the "people" of the State.[29] Indeed, the court criticised on these grounds the description in *Castlemaine Tooheys* of this raison d'être as a "fundamental proposition"[30] – somewhat unfairly I think, as it was never suggested, and never could be suggested, that the proposition be conclusive. To go back to basics, s 92 is part of a constitutional framework that seeks to balance national unity with local autonomy and local diversity. So long as we have States with geographical boundaries, the core responsibility of the States to govern within those boundaries, or by reference to connections to matters or things within those boundaries, will remain, and will need to be fed into the balancing equation. It is probably unhelpful in this context to characterise guarantees like s 92 as "overriding", which does no more than state the obvious. It is the ascertainment of the scope of s 92 – which we now know is the prohibition of discriminatory burdens of a protectionist kind, unless proportionate to achieving a non-protectionist object – that strikes the balance, or draws the line, between State measures that are permissible and those that are impermissible.

Some of the commentators have expressed a concern that elements of *Betfair* presage, in some form or other, a return to the pre-*Cole v Whitfield* "individual right" theory of s 92. Amelia Simpson sees the court's reference to the importance of national competition policy as perhaps having implications for the vulnerability of Commonwealth legislation to s 92, even absent geographical

[24] Former Justice Heydon has now also stated, in characteristically strong and colourful language, his zeal for writing individual judgments: see Heydon JD, "Threats to Judicial Independence: The Enemy Within" (2013) 129 LQR 205. For a response, see Heerey P, "The Judicial Herd: Seduced by Suave Glittering Phrases?" (2013) 87 ALJ 460; see also generally, Coper M, "Joint Judgments and Separate Judgments" in *Oxford Companion to the High Court*, n 9, p 367; Coper M, Rao A, Rice S and Wheeler F, *Multiple Opinions Project*, Report for the National Judicial College of Australia, Canberra, 30 June 2010.

[25] For the debate around this subject, see the references in n 24.

[26] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[27] Sawer G, *Australian Federalism in the Courts* (Melbourne University Press, 1967) p 130.

[28] Comment to the author, quoted with Emeritus Professor Zines' approval.

[29] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 453.

[30] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 473-476.

protectionism.[31] Geoffrey Lindell[32] is critical of the court's references to some of the earlier decisions, especially to the views of arch-individual right theorist Sir Garfield Barwick, that might be taken to signal a renewed affinity with the individual right theory. He concludes, however, having regard to other parts of the joint judgment, that the court was not signalling a return to the individual right theory discredited in *Cole v Whitfield*, but instead, perhaps, the adoption of a stricter form of the test established in that case. I agree that *Betfair* should not be read as signalling a return to the individual right theory.

First, the High Court in *Betfair* expressly affirmed and applied the new approach ushered in by the sea-change in *Cole v Whitfield*.[33] One has to acknowledge the centrality of this fact, notwithstanding the embroidery of wider observations.

Interestingly, the court emphasised the importance of a progressive approach to constitutional interpretation,[34] at first sight in stark contrast to the heavy reliance in *Cole v Whitfield* on constitutional history, that reliance having been used to justify a return to the core concerns of the late 19th century (protectionism), as seen through the lens of the political economy of that time.[35] However, the contrast does not, in my view, involve any contradiction. The need to balance national unity and local autonomy remains a constant. It may play out differently in a world of the internet, instant communication, and porous State borders, but *Cole v Whitfield* provides a generalisable framework that is adaptable to changing circumstances. This is of course a very familiar theme in constitutional interpretation generally.[36]

Secondly, I have no difficulty with the proposition that pre-*Cole v Whitfield* cases may retain some relevance in the new jurisprudence of s 92. Preventing State protectionism was always a concern; the old jurisprudence took s 92 way beyond that concern, but there was nothing like a hint of protectionism to raise the judicial antennae.[37] These cases may remain instructive, and *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 is a good example. Interestingly, the court in *Betfair* used *North Eastern Dairy* to foreshadow a stricter standard for the test of when a State law might be rescued from the jaws of s 92 by being appropriate and adapted, or proportional, to the pursuit of some non-protectionist purpose.[38] It is unlikely that the old problem of when a law with some incidental adverse impact on interstate trade might be regarded as "reasonable regulation" will ever go away.[39]

Thirdly, one should be cautious about reading too much into the discursive observations of the joint judgment in *Betfair*. As Sir Anthony Mason said in the course of the book review I mentioned earlier, "occasionally there is a tendency to draw too much from the cases. Commentators, like counsel in argument, are prone to see more in the words of a judgment than the writer intended to convey".[40] Admittedly, that is often all we have to go on, but the actual outcomes of the cases – the patterns of results – are frequently a better guide.

So, in the end, I do not think that *Betfair* has called into question any of the fundamentals established by *Cole v Whitfield*. That is not to say that *Cole v Whitfield* is immune from criticism. In

[31] Simpson, n 19; see also n 56 (below).

[32] Lindell G, "Betfair v Western Australia: Is There a Regulatory Exception to Section 92?", notes of an unpublished address to the Australian Association of Constitutional Law (South Australian Branch), 22 October 2008. See also Tate P, "The High Court on Constitutional Law: The 2008 Term" (2009) 32 UNSWLJ 169 at 179.

[33] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 451.

[34] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 453-454.

[35] *Cole v Whitfield* (1998) 165 CLR 360 at 385-393, 407.

[36] Stone A, "Constitutional interpretation" in *Oxford Companion to the High Court*, n 9, p 137.

[37] Coper M, "Interstate trade, freedom of" in *The Oxford Companion to the High Court*, n 9, p 354.

[38] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477; see also Lindell, n 32.

[39] Coper, n 11, pp 140-141.

[40] Mason, n 4 at 234.

fact, it is the subject of withering criticism in the recent book to which I referred earlier by Dr Puig.[41] So I thought I would conclude, although it takes my remarks a little beyond a commentary on *Betfair*, with a brief riposte to Dr Puig. Indirectly, this may be considered as further commentary on *Betfair*, because I defend the approach taken in *Cole v Whitfield* and affirmed in *Betfair*.

THE "COMMON MARKET": A SHARED RESPONSIBILITY

I cannot do justice to Dr Puig's thesis here, but in essence it is that the High Court has fallen short of giving effect to s 92's command, as he sees it, and as he asserts the framers of the *Constitution* saw it, that there be a true common market within Australia. In his view, this would prevent any kind of discrimination, not merely discrimination in a protectionist sense. This would also, he says, be easier to apply than the murkier concept of protectionism.

There is no perfect solution to the endemic tension in constitutional law between form and substance.[42] Over-reliance on form can miss the mark in terms of achieving or preventing what was really intended. Over-reliance on substance can deny the court workable principles and present it with an investigative and decision-making task that it is ill-equipped to discharge. But having made this concession, to answer Dr Puig it is necessary to go back to basics.

It may be readily accepted that the aspiration of the framers of the *Constitution* was to establish a common market. But (a) the concept of a common market has no precise meaning; (b) s 92 was not the only section given the work of implementing it; and (c) the courts were not to be the only mechanism by which it might be achieved.

To understand this clearly, return to the truism that the federal system is predicated on (indeed, defined by) some kind of balance between national unity and local autonomy (and thus local diversity), and that the very rationale of the States is to look after the well-being of the people of the State. It cannot be, in this context of federalism, that the common market requires completely uniform or interlocking State laws. Yet the threat to a perfect common market may come about not only from discriminatory measures, whether or not of a protectionist kind, but also from a State non-discriminatingly removing a market for a product altogether, or from the existence of multiple tax regimes, or from a myriad of other non-discriminatory measures.

If any or all of these measures are judged to be unacceptable, it does not follow that s 92 must do the job of eliminating them. Other sections deal with State measures that amount to bounties, customs and excise duties (notably s 90). Where other State laws interfere with the common market, the Commonwealth may legislate to the limit of its powers to produce uniformity, its legislation prevailing over inconsistent State law (s 109).[43] Or the States may agree to a uniform scheme[44] – a political solution, within legal parameters. This is our federal scheme, of which s 92 is but a part. Within this scheme, a scheme with both legal and political dimensions, s 92 has been sensibly confined, in my view, to the prevention of discrimination in a protectionist sense – and even in that narrow sphere, it might usefully be assisted in fact-finding and economic analysis by another body within the contemplation of the constitutional scheme, namely, the Inter-State Commission (see ss 101-104). To pursue that, however, would involve a side trip of large proportions.[45]

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[41] Villalta Puig, n 8. Now see also Villalta Puig G, "Betfair and Sportsbet: The Remains of a Federal Purpose of s 92 of the Australian Constitution" (2013) 87 ALJ 178. As explained below, I reject Dr Puig's criticism; for a like rejection, see Oreb, n 19.

[42] See especially Mason (Sir Anthony), "Form and Substance" in *Oxford Companion to the High Court*, n 9, p 282.

[43] This makes for a superficial analogy with the United States, a comparison about which the High Court has been consistently ambivalent. As to this analogy, see Gleeson J, "What's Left of Cole v Whitfield?" (2013) 24 PLR 97.

[44] For a good overview of the wide range and diversity of recent Australia-wide legislative schemes and intergovernmental arrangements, see Faulkner J, "The Tasmanian Dam Case: Some Federal Issues", Tasmanian Dam Case 30th Anniversary Symposium, Centre for International and Public Law, ANU College of Law, 22 August 2013.

[45] For a quick detour, see "Current Topics: The Inter-State Commission and Section 92 of the Constitution" (1988) 62 ALJ 579 at 586; Coper M, "The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission" (1989) 63 ALJ 731.

It would not make sense, in my view, for s 92 to be thought of as preventing discrimination absent any element of protectionism. This would inject into the equation a criterion of form, detached from the historical purpose of s 92. Moreover, it would create some difficulties for the Commonwealth which Dr Puig does not address. And, as I say, it does not of itself establish the common market in its full glory, so much emphasised by Dr Puig, which may be threatened by non-discriminatory measures and which is the product, so far as it is achievable in a non-unitary system, of the *Constitution* as a whole.

THE CHALLENGE OF ADMINISTRATIVE DISCRETION

If I may connect this up with one last comment about *Betfair*, it is always interesting to speculate about why, if the approach taken in *Cole v Whitfield* and affirmed in *Betfair* is so patently right, it took so long for it to become the conventional wisdom.

I have engaged in such speculation elsewhere at greater length,[46] but one reason, I think, is that, despite the strong suggestion of protectionism in many of the early cases, this protectionism lay more in the administration of legislation and the exercise of discretion than in the legislation itself, and the High Court lacked confidence in its ability to intervene in the administrative process.[47] Administrative law is much more highly developed today, though successful intervention may still depend on the availability of reasons for the exercise of discretion.[48]

The gambling industry is controlled largely by legislative prohibition, relaxed by the exercise of administrative discretion to grant a licence. Prohibition, interestingly, was once the antithesis of freedom of interstate trade, when that freedom was understood as freedom of the individual;[49] since *Cole v Whitfield* the very different question is whether the prohibition is discriminatory in a protectionist sense. A legislative prohibition of general application rarely will be, though *Betfair* illustrates how the Western Australian prohibition of betting via a betting exchange was discriminatory in a protectionist sense in the circumstances of that case (as was Betfair's failure to obtain approval to publish a Western Australian race field). Betfair was also subject to the general prohibition of the Tasmanian gaming legislation, but had managed to obtain a licence. Moreover, the more legislation specifies clear criteria for the grant of a licence and the less room there is for discretion, the less vulnerable the discretion will be to attack.

No question of this kind arose in *Betfair*, except to the extent that Betfair's failure to obtain approval to publish a Western Australian race field was within the contemplation of and reinforced the invalidity of the legislation. I wonder, though, whether the issue of the exercise of administrative discretion is the great sleeper in the new jurisprudence of s 92, and whether the courts of the 21st century will deal with it more successfully than those of the 20th century.[50]

Postscript

Two further internet betting-related cases were decided in 2012: *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 and *Sportsbet Pty Ltd v New South Wales* (2012) 86 ALJR 446. Unlike the outcome four years earlier in *Betfair v Western Australia*, the High Court unanimously rejected s 92 challenges in each of the 2012 cases.

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[46] Coper M, "The Economic Framework of the Australian Federation: A Question of Balance" in Craven G (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) p 131.

[47] For more detail on this issue, see Coper, n 4, pp 303-304.

[48] For a comprehensive and comparative review of this issue, see Kirby M, "The Reason for Administrative Reasons – Osmond Revisited", Council of Australasian Tribunals, Whitmore Lecture 2012, http://www.michaelkirby.com.au/images/stories/speeches/ 2000s/2012/2603.%20SPEECH%20-%20WHITMORE%20LECTURE%202012.pdf.

[49] See especially *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

[50] See generally Zines, n 15, pp 171-173, 187.

In *Betfair v Racing New South Wales*, the court held that a New South Wales approval fee for the use of race field information[51] of 1.5% of wagering turnover did not discriminate against interstate trade, rejecting Betfair's argument that, because of its different business model (it remained the only betting exchange operator based in Australia) and lower margins than other betting operators, the New South Wales fee had a greater impact on its (interstate) business and was thus relevantly discriminatory and protectionist. In *Sportsbet* (although strictly involving the Northern Territory Self-Government Act's replication of s 92 rather than s 92 itself),[52] the court held similarly that the New South Wales approval power was not relevantly discriminatory in a protectionist sense.[53]

In both cases, the court emphasised that the New South Wales law applied uniformly to all types of betting operators – bookmakers (of which Sportsbet was one), TABs, and Betfair's betting exchange operation – and did so irrespective of where they or their customers were located. Even if a differential impact could be shown on individual traders, this did not necessarily amount to discrimination against interstate trade – bearing in mind particularly that the trade even of local traders included interstate and intrastate trade.[54]

The 2012 cases are important in two respects. First, they appear to make it clear – certainly clearer than it had been made in *Betfair v Western Australia*[55] – that there is no movement away from *Cole v Whitfield*, and the rejection there of the individual right theory, as the foundation of the new law on s 92. That a restriction may be imposed on an individual interstate trader does not of itself engage s 92; that restriction must discriminate against interstate trade. Moreover, it must thereby confer an advantage on intrastate trade; so the notion of protectionism remains central to the meaning and constitutional relevance of the concept of discrimination.[56]

Of course, an individual trader may be able to show that the impact of a law on that trader's business relevantly amounts to discrimination against interstate trade, as the Bond Brewing Group had been able to in *Castlemaine Tooheys* in 1990.[57] Secondly, therefore, this really underlines how pivotal are the facts in the new law on s 92, and how challenging are the issues around the adequacy of their proof.[58]

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[51] *Racing Administration Act 1998* (NSW), ss 33, 33A.

[52] *Northern Territory (Self-Government) Act 1978* (Cth), s 49; Coper, n 11, pp 143-144.

[53] As approvals had been granted in each case, and were essentially vehicles for the levying of a fee, the court focused on the impact of the fee and did not significantly engage the general issue raised at the conclusion of this article, namely, the potential of the exercise of administrative discretions, and of legislation authorising the exercise of administrative discretions, to infringe s 92. It would be unusual, however, for legislation to be read as authorising an exercise of discretion that infringed s 92, so the question will generally be whether the particular exercise of discretion was authorised by the legislation. See Zines, n 15, pp 171-173, 187; *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 at [88]-[91] (Kiefel J).

[54] *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 at [34]-[56] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [59]-[77] (Heydon J), [129]-[141] (Kiefel J); *Sportsbet v New South Wales* (2102) 86 ALJR 446 at [26]-[37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [42]-[52] (Heydon J).

[55] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418. See also Gleeson, n 43

[56] *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 at [36] (joint judgment), [59] (Heydon J), [110] (Kiefel J). Kiefel J did leave open, however, the question of whether a law that lessened competition in a market that operated without reference to State boundaries might nevertheless infringe s 92, even absent State protectionism (at [123]-[127]; see also Kiefel S, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36 Mon LR 1). Heydon J, on the other hand, was sceptical about the utility of modern competition law in elucidating the meaning and operation of s 92. The five judges in the joint judgment (at [57]) acknowledged the issue raised by Kiefel J, but agreed with her that this was not an appropriate case in which to express an opinion on the point. In the author's view, as elaborated in this paper, once s 92 is pushed beyond the touchstone of State protectionism and deployed to solve the wider problems of the common market, its operation could become more elusive than ever. Moreover, it should not be assumed that every constitutional problem or aspiration has a judicial solution; achievement of a common market within a federal structure is a shared task, in which the judges should carve out a judicially manageable and appropriate part.

[57] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

[58] Leeming M, "Fact finding" in *Oxford Companion to the High Court*, n 9, p 268; Coper, n 11, pp 146-147. See also text above n 45.

Betfair, perhaps encouraged by its 2008 victory and an alluring but in the end superficial analogy with *Castlemaine Tooheys*, appeared content to rely on the unadorned assertion of a "greater impact" on its business. This greater impact, however, was not shown to involve any loss of market share, reduced profit, change to its offered odds or commission structure, or any other change to its behaviour.[59] More importantly, nor was the greater impact shown to be a greater impact on interstate trade. Neither was Sportsbet able to adduce any evidence of a discriminatory impact on interstate trade. In *Castlemaine Tooheys*, as in *Cole v Whitfield* itself, the court's job was made easier by having an agreed statement of facts. In the absence of this, difficult questions arise as to how the facts are best established, by whom, the role of economic expertise, the weight to be given to expert evidence, and the role of the High Court as the ultimate tribunal. As Sir Anthony Mason observed in 1992, the question of how the facts should be ascertained in s 92 cases "is a hardy perennial to which no answer has yet been returned".[60] Twenty years on, the 2012 cases underline the point.

Appendix 1 (see n 1 above)

[59] *Betfair Pty Ltd v Racing New South Wales* (2012) 86 ALJR 418 at [55]-[56] (joint judgment), [74]-[76] (Heydon J), [130]-[133] (Kiefel J).

[60] Mason (Sir Anthony), "Foreword" in Lee and Winterton, n 11, p vii.